

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2471 OF 2005

M/s.Neo Shine Varnishes ...Appellant

vs.

The Regional Director
E.S.I. Corporation ...Respondent

Mr.Rajesh Gehani for the Appellant
Mr.H.V.Mehta for the Respondent.

CORAM: A.S.OKA, J.
DATE : FEBRUARY 8, 2007.

P.C.:

1. The submissions of the learned Advocates for the parties were heard on the last date. This is an Appeal under section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the said Act of 1948). The Appellant filed an application under section 75 of the said Act of 1948 in the year 1996 before the Employees State Insurance Court at Mumbai. The Respondent filed a written statement on 4th February 1998 and raised an objection as regards maintainability of the Application on the ground that the same was barred by limitation. Therefore, the Appellant filed an Application for condonation of delay at Exh.25. By Judgment and Order dated 12th November 2003, the said Application was rejected by the trial court. The present Appellant applied for review of the said order which has been rejected.

2. A question which arises in this First Appeal is whether

the order dated 12th November 2003 passed by the Trial Court is perverse in as much as the same does not consider whether there exists sufficient cause for condonation of delay.

3. By an order made under section 45-A of the said Act of 1948, it was held that the establishment of the Appellant is covered by the provisions of the said Act of 1948 with effect from 16th February 1988. The order under section 45-A was passed on 16th August 1992. The contention raised by the Applicant is that the Appellant was always diligent and there was continuing cause of action arising in favour of the Appellant to file the Application under section 75. The perusal of the Application under section 75 of the said Act of 1948 made by the Appellant shows that on 30th October 1992, a demand notice was issued by the Respondent on the basis of the order under section 45-A of the said Act of 1948. On 12th November 1992 and on 5th November 1992 the Appellant made the representations to the Ministry of Labour making a grievance regarding the order passed under section 45-A of the said Act of 1948. Another representation was made on 4th October 1993 by the Appellant to the Ministry of Labour, Government of India. There was no response to the said representations. On 23rd May 1995, the Appellant wrote a letter to the Respondent-Corporation making a grievance about the visit of the two Officials on the same day. There is one more representation made by the Appellant to the Ministry of Labour

on 3rd July 1995. Thereafter, a show cause notice was issued on 9th February 1996 by the Respondent-Corporation calling upon the Appellant to show cause as to why a warrant of attachment should not be issued as against the partners of the Appellant. After the said show cause notice was received, the Application No.(ESI) No.11/1996 dated 16th February 1996 under section 75 of the said Act of 1948 was filed by the Appellant.

4. It will be necessary to refer to the provisions of the said Act of 1948. Period of limitation provided for preferring the Application under section 75 is three years from the date of cause of action as provided under section 77 of the said Act of 1948. It will be necessary to refer to section 29 of the Limitation Act,1963 which reads thus :

"29. Savings -

(1) Nothing in this Act shall affect section 25 of the Indian Contract Act,1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any

special or local law, the provisions contained in section 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise, provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Section 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882) may for the time being extend.

Under section 78 of the said Act of 1948, for certain purposes the Employees' State Insurance Court is given the status of a Civil Court. There is nothing in the provisions of the said Act of 1948 to show that the applicability of provisions of sections 4 to 24 of the Limitation Act, 1963 was either expressly excluded or was intended to be excluded. Therefore, in my view, the provisions of section 5 of the said Act of 1963 will be applicable to an Application under section 75 of the said Act of 1948. A decision of a Division Bench of this Court in case of Regional Director, Employees State Insurance Corporation Vs. Shashikant [1983 (2) Bom. C.R. page 260]

supports the said view.

5. Turning back to the impugned order, in paragraph 9 of its Order, the Trial Court has held thus:

"9...Basically the Applicant being not diligent in paying the contribution, therefore, has been ordered by the Corporation to pay the contribution. Being dissatisfied with the said order, Applicant come in the Court. In fact he should have come in the Court within the stipulated period. Therefore, basically the Applicant has not complied with the provisions of law in paying the contribution of getting a code number from the Corporation, but the Applicant is resisting the order passed against him, that too beyond the period of limitation...."

6. It is thus obvious that the Trial Court has taken into consideration the aforesaid aspects which are not at all relevant for deciding whether sufficient cause was made out. Even assuming that the Appellant did not comply with the provisions of the said Act by not paying a contribution and by not applying for Code Number, it is no ground to throw out the Application for condonation of delay when otherwise sufficient cause was made out by the Appellant. The Application made at under section 75 of the said Act, 1948 discloses that from time

to time, the Appellant was making representations to the Central Government and the Application was filed only because a warrant of attachment was issued. A liberal approach is contemplated while deciding an Application for condonation of delay.

7. Therefore, this Appeal must succeed. Hence, I pass the following order :

- i) Impugned Judgment and Order dated 12th November 2003 passed below Application at Exh.25 in Application No.ESI 11/96 is quashed and set aside. Consequently, order dated 21st September 2005 passed below Exh.29 is quashed and set aside.
- ii) Application at Exh.25 for condonation of delay in preferring the Application under section 75 of the said Act of 1948 is allowed.
- iii) The Trial Court will decide the Application under section 75 of the said Act of 1948 in accordance with law.
- iv) Appeal is allowed in above terms.

JUDGE